

## **HISTORICAL DEVELOPMENT CONSENTS IN NSW**

**Organisation:** Tomaree Ratepayers and Residents Association Inc.

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Committee on Environment and Planning

## Submission: Inquiry into Historical development consents in NSW

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### About TRRA

The Tomaree Ratepayers and Residents Association Inc (TRRA) represents the community on a range of issues which affects the Tomaree Peninsula in Port Stephens LGA, including planning and development, economic development, cultural infrastructure and resources, the built and natural environment, tourism and other grass roots issues.

### The problems (terms of reference (a) (b) & (c))

In too many cases, no work is undertaken on approved Development Applications (DAs) for significant periods of time after approval. While there can be genuine and legitimate reasons (most commonly failure to obtain the necessary finance and changes in personal or business circumstances) failure to commence or complete approved works can also be just for financial convenience, in expectation of greater returns in the future (land-banking).

The low threshold for ‘physical commencement’ compounds the problem. While changes to the Regulations in 2020 disqualified some specific minor works<sup>1</sup> from being accepted as substantial commencement (but only for DAs post May 2020), it remains the case that

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<sup>1</sup> Fortunately ‘removing vegetation’ is one of the works which for post 2020 DAs is no longer accepted as ‘physical commencement’, which means that there is no longer an incentive for landowners to clear sites within 5 years even where they are not ready to start work, simply to extend the life of the approval. This may save much vegetation, at least in the short term.

relatively minor work on a site within five years of approval can have the effect of extending the approval indefinitely.

Many DAs therefore sit ‘unused’ for long periods of time, and neighbours and local communities can be surprised to find development commencing on a site which few if any people ‘remembers’ as having consent in the distant past. For this reason, such historical consents are popularly, and appropriately, known as ‘zombie DAs’.

After even a few years:

- there will usually have been significant turnover in the resident population, so many people will not have been able to have their say about the DA when it was approved.
- the legal requirements for developments are likely to have changed, both in terms of assessment criteria, building standards, and other controls (e.g. in Local Environmental Plans (LEPs) and Development Control Plans (DCPs). This means that developments are able to go ahead with lower standards than would now apply.
- relevant circumstances will have changed – at the very least the general effects of climate change, but also specific changes to e.g. biodiversity concerns, changes to the classification of ecological communities, flora and fauna species as vulnerable, threatened or endangered, and changes to the neighbouring environment e.g. other clearing and development, increased traffic, vulnerability to flooding or coastal inundation etc.

Without a requirement at least for updated environmental, social and economic impact assessments, developments are able to proceed which would no longer be acceptable.

## Local examples

Some local examples from our experience in Port Stephens are:

### **Bannisters hotel, Soldiers Point** (formerly Salamander Shores)

- 2011 Concept approval by State Government for major redevelopment but never went ahead
- 2016 approval for extension of consent to keep consent alive?
- 2017 DA (2017-128) approved by Council (with 3 modifications) for some refurbishment – went ahead
- 2021 amended concept plan for demolition and rebuild approved – **approved 2022 despite major local resistance because not that different in height and bulk from 2011 approval**

### **4 Fleet Street, Salamander Bay** – former Colonial Ridge Heritage resort

- 2015 DA (2015-448) for change of use from tourist facility to multi-dwelling housing
- 2018 DA (2018-121) for refurbishment + demolition + small no of detached dwellings, which have gone ahead and been completed

- 2018 DAs (2018-131; 2018-433 and 2018-547) for development of rest of site controversial – eventually withdrawn in 2018/19
- Late 2023 - surprise clearance of 70m strip of bush at rear of site, which included koala and powerful owl habitat – **turned out to have been authorised by the 2018 approval**

#### **Marina Resort, Magnus St, Nelson Bay**

- 2014 DA (2013-626) approved for two overheight apartment towers to replace existing 5 storey hotel
- 2015 DA (2014-782) approved for third overheight apartment tower
- 2016 DA for change of use of approved hotel units to permanent occupancy withdrawn
- 2021 – site changes hands
- 2024 – no commencement, but **may have done enough work to keep 2014-15 approvals alive?**

#### **16 Church St, Nelson Bay**

- 2018 DA (2017-324) approved for 12 unit apartment building
- 2020 site advertised for sale with DA approval
- 2024 no commencement but **may have done enough work to keep 2018 approval alive?**

#### **64 Dowling St, Nelson Bay**

- 2015 DA (2014-708) approved for 5 storey apartment building
- 2024 – not commenced, but **may have done enough work to keep 10 year old approval alive?**

#### **90 Magnus St, Nelson Bay**

- Derelict site for at least 20 years
- Site clearing started May 2024
- Had to go back and find approval for DA 2016/642 for an apartment building
- In this case relatively uncontroversial, but **everyone had forgotten it had approval 8 years prior**

All of the above examples illustrate the issue that where historical approvals are activated after many years, many in the local community are or are likely to be taken by surprise, with no opportunity to raise concerns, including in relation to changed circumstances, contexts and standards.

We understand that many other examples of ‘Zombie DA’ problems have been submitted by other local and State-wide community groups.

## Solutions (terms of reference (d))

It would clearly not be reasonable or practicable to require proponents to start work *immediately* after receiving development approval, but under the current regime approval last far too long and are too easily extended indefinitely, contrary to the public interest as expressed in the objectives of the *Environmental Planning and Assessment Act 1979* (EP&A Act)

There are two obvious major reforms that would address the problems identified above.

**‘Use it or lose it’** – Landowners and others holding approvals for development should have to substantially commence the approved works within a more limited time period, after which the approval should lapse, unless a genuine start has been made, with a reasonable prospect of completion within another relatively short period. We submit that a period of 2 or at most 3 years would be appropriate both for commencement and for subsequent completion.

**A higher threshold for ‘physical commencement’** as grounds for extending the life of development consent.

Another desirable change would be to give consent authorities **the power to revoke or modify development consents, and their conditions**, where there has been a material change to relevant environmental circumstances, or to relevant environmental and planning controls and standards.

## Relevant experience elsewhere

We understand that other jurisdictions have different regimes which incentivise commencement and completion of approved developments. We hope that the Committee will seek out evidence of laws, policies and practices elsewhere that could be adopted or modified to address the obvious problem of ‘zombie’ developments in NSW.

## Moratorium on certain coastal development (term of reference (e))

We support the NSW Nature Conservation Council (NCC) [petition](#) calling for a moratorium on coastal developments approved before 2016 on land containing or adjacent to endangered or threatened ecological communities or habitat of endangered or vulnerable fauna species. Such moratorium to be at least until the completion of this Inquiry and until a review has been undertaken of the impact of predicted sea level rise on any such approved developments not yet commenced.

## Benefits and Costs (term of reference (c))

We submit that there would be significant benefits to the community of the changes we have suggested to address the issue of ‘zombie DAs’. The changes would help to restore some of the faith in the planning system that has been lost due to unexpected and unwelcome impact of developments approved in the past but not acted upon.

There would be no direct cost to taxpayers (or ratepayers) of the changes we suggest, other than the minor administrative costs of statutory amendments. In contrast, there may be significant costs to the public arising from risks of e.g. bushfire or flooding, where out of date standards and conditions apply and cannot be updated.

We have no objection to this submission being made public, in full and unredacted.

Tomaree Ratepayers and Residents Association Inc. (TRRA)

[planning@trra.com.au](mailto:planning@trra.com.au)